UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3

KALEIDA HEALTH, Employer, and CONCERNED CARPENTERS FOR A DEMOCRATIC UNION Petitioner, and BUFFALO BUILDING & CONSTRUCTION TRADES COUNCIL, AFL-CIO, Intervenor, and NORTHEAST REGIONAL COUNCIL OF CARPENTERS, Intervenor.	NLRB Case 03-RC-077821

NORTHEAST REGIONAL COUNCIL OF CARPENTERS' BRIEF IN OPPOSITION TO REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

KROLL HEINEMAN CARTON
Raymond G. Heineman, Esq.
Attorneys for Northeast Regional Council of Carpenters
99 Wood Avenue South, Suite 307
Iselin, New Jersey 08830
Tel. No. (732) 491-2100

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PRELIMINARY STATEMENT

In the instant case, the Petitioner, Concerned Carpenters for a Democratic Union ("CCDU"), seeks to sever carpenters and millwrights from an existing non-conforming bargaining unit of craft employees employed by Kaleida Health ("Kaleida" or "the Hospital") at its five acute care hospital facilities. The carpenters and millwrights sought in the petition are currently jointly represented by the Buffalo Building and Construction Trades Council, AFL-CIO ("Building Trades Council") and several of its constituent local labor unions. Petitioner's avowed purpose is to supplant the Northeast Council of Carpenters ("NRCC" or the "Carpenters") as the representative of the carpenters employed by Kaleida, under the terms of the existing collective bargaining agreement between Kaleida and the Building Trades Council covering the historic unit of skilled trades employees employed by the Hospital.

The Regional Director, in a straightforward application of the Board's Health Care Rules, required the Petitioner to seek an election in the existing non-conforming bargaining unit of all "craft employees who perform in-house construction renovation" represented by the Building Trades Council. As recognized by the Regional Director, the Petition is nothing more than an effort to sever a single craft from the existing non-conforming skilled trades bargaining unit, contrary to the Board's Health Care Rule, the Congressional admonition against proliferation of bargaining units in the health care industry and the Board's case law on craft severance. Accordingly, the Regional Director correctly applied existing precedent and the Board should decline the Petitioner's Request for Review.

STATEMENT OF FACTUAL BACKGROUND

Kaleida is a regional healthcare system and the largest health care provider in Western New York. With five major hospital facilities in the Buffalo area (Buffalo General Hospital, DeGraff Memorial Hospital, Millard Fillmore Gates Circle Hospital, Millard Fillmore Suburban Hospital, and Women and Children's Hospital of Buffalo), more than one million sick or injured patients are seen annually at the five Kaleida hospitals. Approximately 1,800 physicians practice at Kaleida facilities and it employs approximately 3,000 nursing personnel. (CX-4). The parties stipulated that Kaleida is an acute care hospital, within the meaning of the Board's Health Care Rules, 29 CFR Part 103.30(f) (2), 54 FR No. 76, 284 NLRB 1580 (1989).

Kaleida employs employees in various bargaining units at its facilities, including 40 skilled maintenance employees in two bargaining units represented by affiliates of the International Union of Operating Engineers and the Service Employees International Union. The two skilled maintenance units represent skilled maintenance units of carpenters, electricians, plumbers and stationary engineers at specific facilities. As described by Vice-President Croston, the Hospital's maintenance workers are involved in small break/fix repairs and troubleshooting at their assigned hospital facilities. The craft employees represented by the Building Trades Council, which also include carpenters and plumbers, are generally engaged in small and medium size in-house construction renovation projects, which range from complete renovations of entire floors to changing broken sink tops.

As described by Croston, while small repairs of the facility are normally assigned to maintenance staff, either the skilled maintenance employees or the craft construction employees can be assigned to small repairs such as holes in the walls, painting, damage to doors, changing window blinds, and changing hand soap dispensers. At the suggestion of the counsel for

Petitioner, Croston agreed that approximately 2% of the skilled trades workload involves small repairs which are also be assigned to the skilled maintenance employees represented by the Operating Engineers and Service Employees. Both the skilled maintenance and craft employees work under the overall supervision of Facilities Directors Peter Murphy and James Bortz and the Facilities Managers assigned to each Facility.

JOINT REPRESENTATION OF THE CRAFT EMPLOYEES BY THE BUILDING TRADES COUNCIL

As described by the Petitioner, it is not seeking to replace the Building Trades Council as the representative of the current non-conforming bargaining unit of craft employees employed by the Hospital. Rather, Petitioner contends that it is merely seeking to "carve out" the carpenters from the unit represented by the Building Trades Council and to replace the NRCC as the carpenters' representative. The Regional Director properly analyzed the facts of the instant case in recognizing that the Building Trades Council, and its constituent local labor organizations, are a joint bargaining representative of the non-conforming unit of craft employees employed at the Hospital, including the carpenters and millwrights sought by Petitioner.

The Hospital has directly employed craft employees since 2006, under the terms of a collective bargaining agreement negotiated between Kaleida and the Building Trades Council, acting as the representative of its constituent member unions. (JX-4). The Board has recognized that two or more labor organizations are permitted to act jointly as bargaining representative for a single group of employees. Utility Services, Inc., 158 NLRB 592 (1966); Vanadium Corp. of America, 117 NLRB 1390 (1957). Indeed, similar joint bargaining representatives for skilled maintenance employees have been recognized and certified in the health care industry. See e.g. Beth Israel Deaconess Medical Center, Case 1-RD-21608 (Reg. Dir. 2003). Consistent with the concept of a joint bargaining representative, the Regional Director found that the Building

Trades Council bargains directly with Kaleida over the Agreement, while individual signatory members service the Kaleida employees within their trade jurisdiction. In her Decision and Direction of Election, the Regional Director concluded that the Building Trades Council and its signatory constituent local labor organizations constitute a joint bargaining representative. Tree-Free Fibre Co., 328 NLRB 389, 398 (1999); CBS Broadcasting, Inc., 343 NLRB 871 (2004).

As admitted by CCDU Steering Committee Member Thomas Burke, while he was Business Manager of Carpenters, Local 276, Burke threatened Kaleida with picketing to protest Kaleida's award of construction contracts to Telco, a non-union carpentry contractor. Thereafter, Kaleida Vice-President David Croston negotiated the first Memorandum of Agreement directly with Paul Brown, President of the Building Trades Council, to directly hire craft employees from the Council in return for avoiding strikes and picketing at the Kaleida hospital facilities.[1]

The Memorandum of Agreement between Kaleida and the Building Trades Council was renewed, without substantial change, in 2007 and 2011, following brief direct negotiations between Hospital Vice-President Croston and Council President Miller. The Agreement is specifically between Kaleida and the Building Trades Council and provides for the direct hire of "individual employees from the Council on a per diem basis to assist in Project work." The Agreement provides general terms applicable to all trades, including hours of work, shift work, reporting and breaks, apprentice ratios, management control over construction methods and techniques, and prohibitions against non-working personnel. In addition, the Agreement provides that, "contractual terms of employment applicable to the trade in which such individually hired

[1] There is no evidence on the record of the filing of unfair labor practice charges within six months of either Burke's threat to picket Kaleida or the Hospital's recognition of the Building Trades Council and entry into the initial collective bargaining agreement. Section 10(b) of the NLRA restricts the filing of an unfair labor practice to events that occur within 6 months immediately preceding the filing of a charge. North Brothers Ford, Inc., 220 NLRB 1021 (1975).

employees work, as modified by this Agreement, shall apply."[2] Thus, Kaleida and the Building Trades Council have agreed to establish the terms and conditions of employment of the individuals hired through the Council based on the terms and conditions of the collective bargaining agreement of the signatory local affiliate governing the individual employee's trade. See e.g. JX-3.

As noted by Vice-President Croston and CCDU Steering Committee Member Thomas Burke, the outside agreements of the signatory trades are appended to the Agreement without any negotiations between the Hospital and the individual local trades unions. The Carpenters are merely one of 15 affiliates of the Building Trades Council which signed the Agreement.[3] Petitioner criticizes the scope and quality of bargaining between Kaleida and the Council. However, its witnesses confirmed that the local Laborers, Electrical Workers and Carpenters unions have long engaged in such brief collective bargaining with independent signatory employers. It is not surprising that Kaleida routinely agrees to the outside craft rates for skilled trades employees, given that the labor market for craft employees is independent of the health care industry and is based on the outside rates for skilled trades persons. Second Notice of Proposed Rulemaking (NPR II), 284 NLRB at 1556-1562, 53 Fed. Reg. 33900, 33921, 1988 WL 253950 (N.L.R.B. 1988) ("Skilled maintenance employees have separate labor markets and highly mobile cross-industrial career paths as the operation and maintenance of physical plant systems are the same no matter in which industry they are performed.").

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[2] At hearing the parties took the position that the Agreement between the Building Trades Council and the Hospital was not a bar to the petition. In this regard, the union security clauses of the local collective bargaining agreements referenced in the Agreement do not provide the 30 days notice, required by the Act, as a condition of the enforcement of such clauses. The parties did not stipulate that the Agreement was not a bar because it was a Section 8(f) agreement. (Tr. 18-19).

[3] The Electrical Workers, Elevator Constructors, Sheet Metal Workers and Teamsters are not signatory to the Agreement and Kaleida does not directly hire craft employees in the foregoing crafts.

THE REGIONAL DIRECTOR CORRECTLY APPLLIED THE BOARD'S HEALTH CARE RULES TO THE PETITION

Following extensive rulemaking proceedings, on April 21, 1989, the Board, in order to promote industrial and labor stability, issued its Final Rule on Collective Bargaining Units in the Health Care Industry, 29 CFR Part 103.30(a), establishing the following bargaining units:

> Except in extraordinary circumstances and in circumstances in which there are existing non-conforming units, the following shall be appropriate units, and the only appropriate units, for petitions filed pursuant to section 9(c)(1)(A)(i) or 9(c)(1)(B) of the National Labor Relations Act, as amended, except that, if sought by labor organizations, various combinations of units may also be appropriate:
> **(1)** All registered nurses.
> **(2)** All physicians.
> **(3)** All professionals except for registered nurses and physicians.
> **(4)** All technical employees.
> **(5)** All skilled maintenance employees.
> **(6)** All business office clerical employees.
> **(7)** All guards.
> **(8)** All nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards.

284 NLRB 1580. Contrary to the Petitioner's position, the Rule did not exempt construction or craft employees from its scope.

As recognized by the Regional Director, the craft unit represented by the Building Trades Council does not conform to the Rule and is a residual unit of skilled maintenance employees. In this regard, the units of skilled maintenance employees represented by the Operating Engineers and Service Employees and the unit represented by the Building Trades Council, in themselves, do not include all the skilled maintenance employees employed by Kaleida engaged in the maintenance, repair and operation of the hospitals' physical plant systems. Rather, each of the pre-existing units include a portion of the Hospital's employees which would be included within the scope of skilled maintenance employees unit envisioned by the Rule.

In promulgating its Health Care Rule, the Board was aware of the existence of such non-conforming units and determined that it would attempt to apply the rule to subsequent petitions:

> Where there are existing non-conforming units in acute care hospitals, and a petition for additional units is filed pursuant to sec. 9(c)(1)(A)(i) or 9(c)(1)(B), the Board shall find appropriate only units which comport, insofar as practicable, with the appropriate unit set forth in paragraph (a) of this section.

29 CFR Part 103.30(c). In the instant case, the existing craft and maintenance units at the Hospital do not conform to the Rule. Accordingly, the Petitioner was required to seek a unit which conformed, as nearly as possible, with the Rule.

In Kaiser Foundation Hospitals, 312 NLRB 933, 934 (1993), the Board held specifically that Section 103.30(c) did not expand the circumstances which permit petitions "which seek to sever, or carve out, a group of employees from an existing unit, whether or not that unit conforms to those established by the Rule." In Kaiser, unlike the instant case, the Petitioner sought to carve out a conforming unit of skilled maintenance employees from a broader non-conforming non-professional unit. Even though the petition in Kaiser sought a unit permitted by the Rule, the Board held that the Rule did not allow severance of a narrower conforming unit. Specifically, the Board found "nothing in the Rule may be read to expand the circumstances in which petitions seeking to sever a group of employees from an existing unit will be entertained." Id. The Board specifically rejected the petition, as in the instant case, "for an election among a subgroup of an existing, nonconforming unit." The Board premised its holding on the furtherance of the long-standing policy of promoting industrial and labor stability and Congress' admonition against undue proliferation of bargaining units in the health care industry. Kaiser at 935.

The Petitioner's reliance on Kaiser is misplaced. The Board in Kaiser did not hold that the Rule does not apply to a petition seeking to carve-out a unit from a larger pre-existing unit. Rather, it held that the Rule did not provide for a conforming unit to be severed from an existing unit, merely because the petitioned for unit was one of the eight units permitted by the Rule. The Board applied the Rule to hold that, where there were current non-conforming units, new petitions in the health care industry should be filed consistent with currently recognized non-conforming units. See also Crittenton Hospital, 328 NLRB 879 (1999). In this regard, the Board noted that it would require decertification petitions to be filed in the existing certified or recognized unit, even if that unit does not conform to those established under the Rule. Kaiser Foundation Hospitals, 312 NLRB at 934. Similarly, the Board has held that the Rules do not privilege the withdrawal of recognition from voluntarily recognized non-conforming units. Pathology Institute, Inc., 320 NLRB 1050 (1996). In the instant case, the Petitioner does not seek to represent either a conforming unit under the Rule or the non-conforming unit of all craft employees represented by the Building Trades Council.

The Petitioner's effort to distinguish the craft employees from the employees included in skilled maintenance units under the Rule is also misplaced. The Board's Rule contemplated the inclusion of craft employees engaged in construction renovation in skilled maintenance units. In expanding the five initially proposed bargaining units to include skilled maintenance units, the Board in NPR II, based in part on evidence proffered by the International Union of Operating Engineers and the National Building and Construction Trades Department, AFL-CIO, was impressed with the range of sophisticated skills exhibited by maintenance employees employed at acute care hospitals in the health care industry:

> Evidence from the rulemaking hearings shows that skilled maintenance employees perform functions apart from those of unskilled service,

> maintenance, and clerical employees in that these employees deal with highly complex and sophisticated systems and equipment. While they occasionally perform routine, unskilled tasks, skilled maintenance employees are generally engaged in the operation, maintenance, and repair of the hospital's physical plant systems, such as heating, ventilation, air conditioning, refrigeration, electrical, plumbing and mechanical. Work on these systems requires abstract skills and knowledge at levels considerably higher than those of other non-professional hospital employees. Skilled maintenance employees are rated more highly, for example, even than physicians on the manipulation of "things". Skilled maintenance employees are frequently required to have postsecondary training in their field, such as vocational or trade school. Even the lower skilled maintenance employees in plant operations and maintenance are required to have higher skills than those required of service employees.

284 NLRB at 1556-1562, 53 Fed. Reg. 33920 (N.L.R.B. 1988).

The Board's Rulemaking proceeding shows that the Board contemplated varying degrees of skill among classifications to be included in a skilled maintenance unit. San Juan Medical Center, 307 NLRB 117 (1992). Clearly, the small break/fix repairs and troubleshooting performed by the maintenance employees at Kaleida, as described by Croston, do not comport with the Board's understanding of the full range of craft expertise exhibited by skilled maintenance employees. Rather, the skill level exhibited by the trades employees represented by the Building Trades Council are more consistent with the range of sophisticated building construction skills considered by the Board in the course of rulemaking. See e.g. Jewish Hospital of St. Louis, 305 NLRB 955, 956 (1991).

In cases pre-dating the adoption of the Rule, the Board had included construction trades employees within skilled maintenance units at acute care hospitals. For example, in The Long Island College Hospital, 310 NLRB 689, 695 (1993), the Board included trades employees, who worked together to complete small and medium construction projects in a skilled maintenance unit. As in the instant case, the construction trades employees in Long Island converted waiting rooms and testing areas to private practice suites, renovated a dialysis center, and generally

moved walls and plumbing, installed new ceilings and recessed lighting, installed new floors and ran electrical lines.

Following rulemaking, the Board has continued to include skilled craft employees engaged in the installation of plant systems and equipment, and construction activities within skilled maintenance units. Toledo Hospital, 312 NLRB 652, 654 (1993); University of Pittsburgh Medical Center, 313 NLRB 1341, 1344-45 (1994). In Ingalls Memorial Hospital, 309 NLRB 393, 397 (1992), the Board included carpenters and painters employed in the Hospital's Construction Department in a skilled maintenance unit of maintenance employees in the Hospital's Plant Operations Department. Similarly, in McLean Hospital Corporation, 309 NLRB 564, 565-67 (1992), the Board included construction craft employees in a skilled maintenance unit. Similar to the instant case, the maintenance employees in McLean were engaged in major renovation projects, including remodeling space to create new laboratories, renovating an entire residential unit, and completely remodeling the Hospital pharmacy. The Board in Clarian Health Partners, Inc., 344 NLRB 332 (2005), while finding a petitioned for skilled maintenance inappropriate because it did not include a third facility, described the skilled maintenance unit as including employees responsible for "the design, construction, maintenance and repair of hospital buildings and mechanical systems." See also South Nassau Communities Hospital, Case 2-RC-9363 (Reg. Dir., 1998); Western Pennsylvania Hospital, Case 6-RC-11860 (2000).

During rulemaking, the Board noted that skilled maintenance employees generally exhibited advanced training in their respective crafts:

> Contrary to virtually all nonsupervisory service classifications, which require only a grade school education, skilled maintenance classifications require completion of high school; at least some trade or vocational school experience, if not graduation therefrom; completion of formal or informal apprenticeship programs, which may take several years; or an associate's or bachelor's degree.

284 NLRB at 1556-1562, 53 Fed. Reg. 33920-21. While Vice-President Croston was unaware of the level of the training and education of Kaleida maintenance staff, the Board's understanding of the education and training of employees to be included in skilled maintenance units is consistent with the apprenticeship programs sponsored by the affiliates of the Building Trades Council and the training levels of the employees hired by Kaleida under the terms of its Agreement with the Building Trades Council.

The Petitioner posits that the instant case presents a novel issue for consideration by the Board on review. Far from being novel, the Congress rejected the very unit sought by Petitioner at the time it amended the Act to include the health care industry. A major concern of Congress in passing the Health Care Amendments to the Act was that the Board would allow a proliferation of units, specifically individual construction craft units:

> During the 1973 legislative hearings on S. 794, the fear expressed by a number of witnesses was that Board precedent might permit a separate unit for each trade or craft found in hospitals. Thus, e.g., Sidney Lewine, testifying on behalf of AHA, and Richard V. Whelan, Jr., representing the Ohio Hospital Association, noted with apprehension the proliferation that would result if the Board were to grant a separate unit to each construction craft such as stationary engineers, carpenters, plumbers, electricians, pipefitters, and painters. (Coverage of Nonprofit Hospitals Under National Labor Relations Act, 1973, Hearings on S. 794 and S. 2292, at 128-29, and 465-66, respectively.) The Board's proposal directly takes into account this concern, which was called to Congress' attention, by putting all such separate skilled crafts into one skilled maintenance unit.

284 NLRB at 1556-1562, 53 Fed. Reg. 33923. The Congressional concern that the recognition of individual construction craft units, such as that sought by Petitioner, would prove disruptive in the health care industry was the basis of the Congressional admonition against proliferation of health care units, which fueled the subsequent litigation over appropriate units in the industry. See e.g. American Hospital Association v. N.L.R.B., 499 U.S. 606 (1991).

Petitioner argues for the application of the traditional community of interest standard applicable to units in the construction industry. However, the unit sought by the Petitioner is exactly the unit configuration which Congress sought to avoid in amending the Act and implicates the very reason that the Board engaged in rulemaking in the first place. Far from being novel, the Petitioner seeks the very unit configuration rejected by the Congress in amending the Act and by the Board in adopting the Rule.

The Board in NPR II rejected the concern that the recognition of skilled maintenance units would lead to the proliferation of bargaining units in the healthcare industry, contrary to the Legislative policy:

> Contrary to our concern, as expressed in our NPR, there was no evidence adduced at the rulemaking hearings that establishing a separate unit of skilled maintenance employees will lead to proliferation of bargaining units in the industry. No labor organizations have sought or demonstrated the appropriateness of other small units. Moreover, the skilled maintenance employee unit may be viewed as a consolidation of specialized employees inasmuch as it combines such employees as carpenters, painters, plumbers, and electricians. The only employee classification performing work similar to that performed by traditional craft or trade-type maintenance employees are biomedical technicians. Biomedical technicians work on and repair sophisticated computer-based equipment, and because of both their skills and training share a community of interest with other skilled maintenance employees and in many instances have already been included in some such units.

284 NLRB at 1556-1562, 53 Fed. Reg. 33922. Thus, in dismissing concerns regarding the proliferation of bargaining units, the Board specifically noted that craft unions had not sought to represent crafts separately and that crafts, such as carpenters, would be consolidated with other specialized crafts in skilled maintenance units, under the Rule. The Petitioner seeks the very type of construction craft unit that was at the heart of Congress' concerns in amending the Act to extend jurisdiction over the health care industry. The Board's comments during rulemaking

clearly and unambiguously rejected the possible appropriateness of the unit limited to construction craft carpenters, sought by the Petitioner in the instant case.

In reviewing the Board's Health Care Rules, in Memorandum GC 91-3 (NLRBGC, May 9, 1991), the General Counsel described the intended scope of skilled maintenance unit under the Rule as including the carpenters sought by the Petitioner in the instant case:

> All skilled maintenance employees (generally includes all employees involved in the maintenance, repair, and operation of the hospital's physical plant systems, as well as their trainees, helpers, and assistants). Classifications which should generally be included in such units are carpenter, electrician, mason/bricklayer, painter, pipefitter, plumber, sheetmetal fabricator, automotive mechanic, HVAC (heating, ventilating, and air conditioning) mechanic, maintenance mechanic, chief engineer, operating engineer, fireman/boiler operator, locksmith, welder, and utility man.

53 Fed. Reg. 33923-24, 284 NLRB at 1561-62. The General Counsel, consistent with the scope of the Rule, noted the limited scope of the extraordinary circumstances which would justify a departure from the Rule. In the instant case, however, the recognized craft unit is an appropriate residual unit, encompassing all the skilled craft employees employed by Kaleida and does not present an extraordinary circumstance under the Rule. St. John's Hospital, 307 NLRB 767 (1992); St. Mary's Duluth Clinic Health System, 332 NLRB 1419 (2000) (only residual unit of all unrepresented employees in unit is appropriate).

The craft employees represented by the Building Trades Council all work under the overall supervision of Facilities Directors Murphy and Bortz and the respective Facilities Managers. While each trade has a foreman on a project, the work of each trade is coordinated on a project by a general foreman. The trades share common facilities and work in close proximity in an integrated production process. The craft employees are hourly paid and receive benefits through multi-employer ERISA regulated benefit funds, sponsored by each trade and to which Kaleida contribute. In addition, the trades share a 7 year history of collective bargaining in a single unit on a multi-craft basis. Thus, the Regional Director properly recognized that the overall craft unit represented by

the Building Trades Council is an appropriate residual unit which cannot be severed further under the Board's Rule.

THE REGIONAL DIRECTOR CORRECTLY RECOGNIZED THAT KALEIDA IS NOT AN EMPLOYER UNDER SECTION 8(f) OF THE ACT

Notwithstanding the stipulation that Kaleida is an acute care hospital, Petitioner seeks to bypass the Board's Health Care Rule, contending that Kaleida is "an employer engaged primarily in the building and construction industry," within the meaning of Section 8(f) of the Act. 29 U.S.C. 158(f). Petitioner's position relies on the argument that, since 2006, the Hospital has acted as its own "general contractor" for construction and renovation projects on its existing facilities, performing much of the construction work directly with trades employees under its collective bargaining agreement with the Buffalo Building and Construction Trades Council, AFL-CIO. The Regional Director rejected the suggestion that the Hospital's participation in the construction industry qualified it as an employer under Section 8(f) of the Act or, otherwise, exempted the Petitioner from the effects of the Rule.

The record clearly demonstrates that Kaleida engages in construction activity and participates in the construction industry. In this regard, Kaleida is an employer "in the construction industry" under the proviso to Section 8(e) of the Act. Church's Fried Chicken Inc., 183 NLRB 1032 (1970). However, the standard applied by the Board in determining whether an employer "is engaged primarily in the building and construction industry," under Section 8(f), is not the same standard applied by the Board to determine an employer's status under the proviso to Section 8(e). In Irving Ready-Mix, 357 NLRB No. 105 (2011), the Board determined that the Section 8(e) exemption was broader in scope "than Section 8(f), which more narrowly covers

employers 'engaged primarily in the building and construction industry." See also Engineered Steel Concepts, 352 NLRB No. 73 (2008).

In the instant case, Kaleida primarily operates acute care hospitals and provides healthcare services throughout the region. In providing its health care services, Kaleida engages in ancillary support functions, such as dietary operations and construction activities. However, Kaleida does not compete either as a food service provider in the local restaurant industry or as a general contractor in the area construction market. Rather, under its collective bargaining agreement with the Building Trades, Kaleida supplements its skilled maintenance workforce with craft employees to self-perform ongoing small and medium size projects at its existing acute care facilities and to perform small maintenance repairs. Under the Building Trades Council's collective bargaining agreement, craft employees represented by the Building Trades Council, including the NRCC, are present on a permanent basis at the Hospital as a supplement to the Hospital's permanent skilled maintenance workforce.

In Zidell Explorations, 175 NLRB 887 (1969), the Board concluded that an employer was "engaged primarily in the building and construction industry," under Section 8(f), for purposes of a major construction project with the United States Government. In Zidell, the employer had expanded its traditional operations, transporting hazardous materials, by taking on a major construction project under contract with the United States government to dismantle a ballistic missile facility. In the instant case, unlike Zidell, the Hospital is not acting as a contractor to another owner for major construction. Further, the Hospital is not even acting as its own general contractor for a major series of new facilities. In this regard, the Hospital has continued to utilize national and regional construction employers to act as construction managers and general contractors on new construction, "new builds." (C-1 and C-2). Kaleida is simply supplementing

its own workforce with skilled trades employees to perform small and medium construction projects at its existing acute care facilities.

In Rocket Hill, Inc., 29-CA-26844, JD(NY)-45-06, 2006 WL 2827710 (September 29, 2006), an Administrative Law Judge concluded that a collective bargaining agreement between an employer, which was building its own restaurant, and various unions, was not an 8(f) agreement. Despite the Administrative Law Judge's finding that Rocket Hill was an 8(e) employer, he refused to extend to Rocket Hill the status of an employer "primarily" engaged in the business of construction under 8(f). In concluding that Rocket Hill was not an employer under 8(f), the Administrative Law Judge observed that the employer, in entering the agreement with the union, did not intend to use the agreement to bid on future construction jobs, which Congress posited as the rationale for such pre-hire agreements. The Administrative Law Judge further observed that in an 8(f) determination the "primary or principal business of the employer is paramount". Thus, Petitioner's argument that the petitioned-for employees of Kaleida are primarily engaged in the building and construction industry is irrelevant. The focus of Section 8(f) is on the industry in which the employer is primarily engaged.

The Administrative Law Judge distinguished Rocket Hill from the Board's Section 8(e) analysis in Church's Fried Chicken Inc., 183 NLRB at 1035, by noting that, Church's primary business as a fast food restaurant was "immaterial" and that only Church's operations in store construction were relevant to an 8(e) determination. In contrast, the determination as to whether an employer is "primarily engaged in the construction business" and entitled to enter into a Section 8(f) pre-hire agreement, depends upon whether the employer's primary or principal business is construction and whether or not the employer enters into such agreements for the

purposes of bidding and ensuring the availability of skilled workers in future construction projects.

In the instant case, the Hospital does not need a supply of skilled labor so that it can bid on work in the construction industry. Rather, it seeks access to skilled labor to perform renovations and construction on existing facilities and to supplement its existing workforce on small projects. Kaleida's contribution records from the Empire Funds show that Kaleida maintains a permanent workforce of carpenters on its payroll to supplement its skilled maintenance workforce. (CX-5 through 7). Further, the Hospital's payroll records indicate that other trades, such as plasterers, laborers, painters, plumbers, and asbestos workers, are similarly employed under the Building Trades' collective bargaining agreement on a semi-permanent basis. (JX-2).

When an employer is clearly working primarily within the construction industry, there is a presumption that a union and the employer intend their relationship to be an 8(f) agreement. Central Illinois, 335 NLRB 717,718 (2001). However, as noted by the Regional Director, employers not primarily engaged in the construction industry do not have the privilege of entering into 8(f) pre-hire agreements and the presumption does not apply. Rocket Hill, Inc. Kaleida, as an acute care hospital, was not privileged to enter into an 8(f) pre-hire agreement in 2006. However, its conduct in extending recognition to the Building Trades Council was not timely challenged in an unfair labor practice proceeding before the Board. Further, the Building Trades Council's status as the representative of the craft employees employed by the Hospital has not been challenged, despite the fact that its Agreement with the Hospital does not bar the filing of a representation petition.

Section 10(b) of the Act precludes a party, after the expiration of the Section 10(b) period, from subsequently "attacking the majority status of the Unions at the time of the recognition and or the signing of the contracts." Strand Theatre of Shreveport, 346 NLRB 523 (2006). In Strand, as in the instant case, the initial recognition of the Union took place without an election or any showing that the employees wished to be represented by the Union and the parties' initial collective bargaining agreement was never challenged by the filing of a charge within six months of the agreement's execution. Regardless of the circumstances of the initial recognition, the Board held that Strand was not free to withdraw recognition from the Union following the expiration of the Section 10(b) period. In the instant case, the bargaining relationship between the Hospital and the Building Trades Council has long matured into a lawful Section 9(a) relationship by virtue of Section 10(b) of the Act, 29 U.S.C. 160(b), and is no longer subject to attack, without a Board election in the established unit. See also Route 22 Toyota, 337 NLRB 84 (2001); Sewell-Allen Big Star, 294 NLRB 312, 313-314 (1989).

In Engineered Steel Concepts, supra., the employer, which was engaged in the hauling of steel related products, signed a construction industry collective bargaining agreement with the Teamsters union at a time when it did not employ any drivers. Despite the circumstances of the initial recognition, the Board found that the employer's subsequent abrogation of its collective bargaining agreement was unlawful, even though it would have been privileged by Section 8(f) of the Act, if the employer was primarily engaged in the construction industry. The Board rejected the claim that the bargaining relationship at issue was governed by Section 8(f). As recognized by the Board, a contract between a union and employer, that is not entitled to enter into a Section 8(f) agreement, is necessarily based upon a 9(a) relationship:

> Under the Act, collective-bargaining agreements generally are governed by Sec. 9(a). Sec. 8(f) creates an exception for certain collective-bargaining agreements between employers engaged primarily in the building and construction industry and unions having members employed in that industry. Thus, the threshold question in determining the applicability of Sec. 8(f) is whether the employer is engaged primarily in the building and construction industry. The burden of establishing that status lies with the party seeking to avail itself of the 8(f) statutory exception.

Engineered Steel 352 NLRB at 589. Accordingly, just as the Regional Director treated the Building Trades Council's relationship with Kaleida as akin to a Section 9(a) relationship, the Board in Engineered Steel Concepts treated the parties' relationship as arising under Section 9(a).

The Board stated its standard concerning challenges to majority status in non-construction industries in Oklahoma Installation Co., 325 NLRB 741,742 (1998:

> [A] union ... is not required to show the employer any evidence of majority status unless the employer requests to see the evidence. Moisi & Son Trucking, 197 NLRB 198 (1972); Soil Engineering Co., 269 NLRB 55 (1984); Marysville Travelodge, 233 NLRB 527 (1977); and Lincoln Mfg. Co., 160 NLRB 1866, 1876-1877 (1966). If an employer voluntarily recognizes a union based solely on that union's assertion of majority status, without verification, an employer is not free to repudiate the contractual relationship that it has with the union outside the 10(b) period, i.e., beyond the 6 months after initial recognition, on the ground the union did not represent a majority when the employer recognized the union. Morse Shoe, Inc., 231 NLRB 13 (1977); Berbiglia, Inc., 233 NLRB 1476 (1977). Moreover, where an employer outside the construction industry expressly recognizes a union as the 9(a) representative, the union becomes the 9(a) representative of the unit employees, unless the employer timely produces affirmative evidence of the union's lack of majority at the time of recognition, i.e., within the 10(b) period. See Royal Coach Lines, 282 NLRB 1037 (1987); E. L. Rice & Co., 213 NLRB 746 (1974); Moisi & Son Trucking, supra.

Unions are similarly barred from challenging the validity of an "incumbent union's initial recognition... where Section 10(b) would have precluded a direct challenge to the legality of

such recognition in an unfair labor practice proceeding." Barrington Plaza & Tragniew, 185 NLRB 962, 964 (1970); Casale Industries Inc., 311 NLRB 951, 952 (1993). As noted by the Board, a contrary rule would render longstanding relationships, as in the instant case, vulnerable to attack and subvert the purposes of the NLRA to ensure stability in labor relations.

Based on the foregoing, the bargaining relationship between Kaleida and the Building Trades Council, and its constituent members, is based on Section 9(a) of the Act, rather than Section 8(f) principles recognized in John Deklewa & Sons, 282 NLRB 1375 (1987) and its progeny. In the instant case, the overall craft unit represented by the Building Trades Council, and including the employees in the trades of its constituent labor organizations, is a functionally distinct and clearly identifiable group of craft employees employed by Kaleida. As recognized by the Regional Director, the existing unit constitutes a residual unit of skilled maintenance employees, which is appropriate under the Board's Rule in the Health Care Industry. In contrast, the unit of construction carpenters, while appropriate in the commercial construction industry, is inconsistent with the Board's Health Care Rule and would be contrary to the policy of industrial and labor stability promoted by the Act. The Regional Director's decision balances the competing goals of industrial stability and employee free choice by directing an election in the overall craft employees unit. The fact that the Petitioner is unable to attract support outside of the extent of its organizing does not detract from the balance struck in the Decision and Direction of Election.

THE REGIONAL DIRCTOR CORRECTLY APPLIED ESTABLISHED CRAFT SEVERANCE PRINCIPLES TO REFUSE TO DISRUPT THE EXISTING BARGAINING UNIT

In Kaiser Foundation Hospitals, the Board applied craft severance rules to a petition seeking to sever a conforming unit of skilled maintenance employees from a broader non-conforming unit of almost all the non-professional employees employed by the employer. Before reaching the issue of whether to sever the conforming unit of skilled maintenance employees from the broader non-conforming unit, the Board initially observed that Section 103.30(c) did not authorize petitions to sever or carve out a group of employees from an existing unit. The Board, in Kaiser, further held that the Rule's provisions on residual units govern petitions for residual units where, as in the instant case, units narrower in scope than those permitted by the rule exist. In the instant case, the petition, which seeks to further divide an existing non-conforming residual unit, is contrary to the Rule. If Petitioner is seeking a non-conforming unit, it must seek to represent either the existing recognized non-conforming unit or a residual unit of all unrepresented employees within the skilled maintenance unit classifications employed at the Hospital. Since the Petitioner is seeking neither unit, craft severance is barred by the Rule and should not even be entertained.

In any event, the Regional Director properly concluded that the petitioned-for unit is inappropriate even under the Board's craft severance principles. Under the Board's analysis in Mallinckrodt Chemical Works, 162 NLRB 387 (1966), the following factors are relevant: whether the proposed unit consists of a distinct and homogeneous group of skilled journeymen craftsmen or a functionally distinct department; the collective-bargaining history related to those employees; the extent to which the petitioned-for unit has established and maintained a separate identity during its inclusion in the overall unit; the degree of integration of the employer's

production processes; the qualifications of the union seeking severance; and the pattern of collective bargaining in the industry. In applying Mallinckrodt, the Board has placed a heavy burden on the party seeking severance. See e.g. Kaiser Foundation Hospitals, 210 NLRB 949 (1974).

In the commercial construction industry, carpenters generally constitute a distinct and homogenous group of skilled journeymen craftsmen. At hearing, Petitioner labored long and hard to prove that carpenters are a distinct construction craft. That alone, however, would not justify severance. At Kaleida, while carpenters are employed on small and medium sized construction projects, there are also carpenters employed in the maintenance department, performing small repairs and troubleshooting functions. The carpenters employed within the maintenance units work in the same hospital facilities where the petitioned-for carpenters work on small and medium projects. Both groups share the same base skills and utilize the same basic hand tools. As noted by Vice-President Croston and other witnesses, the craft carpenters sought by the Petitioner are sometimes assigned the same small repairs as the maintenance employees. Both groups of carpenters work in the Facilities Departments under the same overall supervision. Thus, within Kaleida, the carpenters sought by the Petitioner do not represent a distinct and homogenous group of skilled craftsmen.

As found by the Regional Director, the carpenters employed by Kaleida are also integrated in the larger complement of trades employees represented by the Building Trades Council, further militating against severance under the Board's traditional principles. The trades employees are all craft employees. They work side by side on a series of construction projects under the same overall supervision and direction. They store their tools in a common area and share the same work hours, shifts and work assignments. The carpenters do not work in a

functionally distinct department. Rather, while they work on projects under the immediate lead of a carpenter foreman, they work under the overall supervision of the general foreman coordinating the project, as well as the Facilities Directors and applicable Facilities Managers.[4]

The Building Trades Council has a successful seven year history of bargaining on behalf of the carpenters sought by the Petitioner, in a multi-craft unit. The Council negotiated directly with the Hospital, without the intervention of local union bargaining on behalf of individual trades. As described by Vice-President Croston, the initial contract was a pilot and was contingent on meeting the needs of the Hospital for labor stability and peace. Based on the success of the Building Trades Council's representation, the initial agreement has been extended in substantially the same format for two additional 5 year terms. Beaunit Corporation, 224 NLRB 1502 (1976) (deferring to 7 ½ year bargaining history in denying severance of electricians).

The petitioned for unit has been represented successfully within the established unit structure. There have been no separate negotiations regarding the carpenters. There is no evidence of any grievance activity within the bargaining unit related to the carpenters. While the record indicates that minor jurisdictional disputes originated in the early years of the Agreement, while Thomas Burke was Business Manager of the local carpenters union, those disputes have been long resolved and have not re-occurred. Vice-President Croston testified that the asserted jurisdictional disputes never reached his level and that he was unaware of any grievance activity. As described by Burke, the current petition originated in internal disagreements within the local carpenters union, unrelated to the Building Trades Council's overall representation of the craft employees, including carpenters. Nothing in the record indicates an inability or unwillingness by

[4] Nothing in the record indicates that the carpenter foremen employed by Kaleida are supervisors within the meaning of the Act.

the Building Trades Council to continue to represent the carpenters as part of the overall unit of trade's employees.

The success of the Hospital's small construction program is dependent on the coordination of the various crafts. If the carpenters, the largest single complement of craft employees ceased work, the program's production would cease. Indeed, the initial threat in 2006 to engage in secondary and jurisdictional picketing by Burke, on behalf of the Carpenters, was part of the initial impetus for Kaleida's agreement with the Building Trades Council to provide craft employees directly to the Hospital. Petitioner's focus on the role of the carpenters in the provision of health care misses the point. The carpenters' participation is essential to maintaining the production of the craft employees represented by the Building Trades Council.

The evidence does not establish that the Petitioner is a traditional craft representative or is particularly qualified to represent a traditional craft unit; indeed, the Petitioner has no experience representing employees of any kind. It was only recently was formed by members and former officers of the local carpenters union shortly before the petition was filed. Kaiser Foundation Hospital, 312 NLRB at 936; Beaunit Corporation, 224 NLRB at 1505. The CCDU does not represent any carpenters, does not sponsor an apprentice and training school, and does not sponsor any benefit funds. Further, the experience of the former Carpenters' local union business manager, who is a member of the Petitioner's steering committee, is hardly conducive to either stable or lawful labor relations. While the Petitioner professes to be unaffiliated, the Sheet Metal Workers International Association and the other international unions bankrolling the Petitioner's organizing drive have no expertise or experience in the representation of carpenters.

Finally, there is no evidence of representation of carpenters on a separate basis by any regional health care systems or acute care hospitals. Id. Nothing in the record indicates the

representation of craft employees in the hospital industry on the basis of the craft units which were the source of the Congressional admonition against bargaining unit proliferation in the health care industry.

Even assuming the craft status of the carpenters sought by Petitioner, it will not effectuate the purposes of the Act to permit the disruption of the existing Building Trades Council unit by directing an election for separate representation of the group of carpenters, as sought by Petitioner. Rather, the Regional Director's decision is supported by relationship of the essential duties of the carpenters sought to Kaleida's overall construction and maintenance processes; the separate administrative structure of the Employer's maintenance department as a whole; the seven year collective-bargaining history resulting in three successive contracts; and the absence of any substantial countervailing considerations. Under these circumstances, the interests served by maintaining stability in the existing Building Trades' unit outweigh the interests served by permitting a separate severance election. In view of the foregoing and, particularly in light of the policy against proliferation of bargaining units in the health care industry and the policy in favor of industrial stability, the Regional Director properly rejected Petitioner's effort to sever the carpenters from the existing bargaining unit as inappropriate.

CONCLUSION

Based on the foregoing, the Northeast Regional Council of Carpenters requests that the Petitioner's request for review of the Regional Director's Decision and Direction of Election in the existing bargaining unit of craft employees be denied.

Respectfully submitted,

KROLL HEINEMAN CARTON
Attorneys for Northeast Regional Council of Carpenters

By: s/Raymond G. Heineman
Raymond G. Heineman

Dated: July 6, 2012

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3

KALEIDA HEALTH, Employer, and CONCERNED CARPENTERS FOR A DEMOCRATIC UNION Petitioner, and BUFFALO BUILDING & CONSTRUCTION TRADES COUNCIL, AFL-CIO, Intervenor, and NORTHEAST REGIONAL COUNCIL OF CARPENTERS, Intervenor.	NLRB Case 03-RC-077821

CERTIFICATE OF SERVICE VIA ELECTRONIC MAIL

I hereby certify that a copy of the Northeast Regional Council of Carpenters' Brief in Opposition to Request for Review of Regional Director's Decision and Direction of Election, was electronically mailed to the following:

National Labor Relations Board
Niagara Center Building
130 S. Elmwood Avenue, Suite 630
Buffalo, New York 14202-2465
nlrbregion3@nlrb.gov

Catherine Creighton, Esq.
ccreighton@cpjglaborlaw.com

Richard D. Furlong, Esq.
Rfurlong@lglaw.com

Michael Connors, Esq.
Mconnors@kaleidahealth.org

/s/ RAYMOND G. HEINEMAN
RAYMOND G. HEINEMAN

DATED: July 6, 2012